Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-130

ROBERT J. QUINN, individually and as Commissioner of the Chicago Fire Department,

Petitioner,

vs.

TOM C. CLARK, Justice, JOHN S. HASTINGS, Circuit Judge, JOHN PAUL STEVENS, Circuit Judge, FRANK J. McGARR, District Judge, and FRANCIS MUSCARE,

Respondents.

MOTION FOR LEAVE TO FILE PETITION FOR A WRIT OF MANDAMUS AND PETITION FOR A WRIT OF MANDAMUS, AND, IN THE ALTERNATIVE, PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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TOM C. CLARK, Justice, JOHN S. HASTINGS, Circuit Judge, JOHN PAUL STEVENS, Circuit Judge, FRANK J. McGARR, District Judge, and FRANCIS MUSCARE,

Respondents.

MOTION FOR LEAVE TO FILE PETITION FOR A WRIT OF MANDAMUS

The petitioner, Robert J. Quinn, individually and as Commissioner of the Chicago Fire Department, moves the Court for leave to file the petition for a writ of mandamus hereto annexed; and further moves that an order and rule be entered and issued directing the Honorable The United States Court of Appeals for the Seventh Circuit, the Honorable Tom C. Clark, Associate Justice (Retired) of the United States Supreme Court, sitting by designation as a

Judge of the Court of Appeals for the Seventh Circuit, the Honorable John S. Hastings, Senior Judge of said Court of Appeals, the Honorable John Paul Stevens, Circuit Judge of said Court of Appeals, the Honorable The United States District Court for the Northern District of Illinois, and the Honorable Frank J. McGarr, District Judge of said District Court, to show cause why a writ of mandamus should not be issued against them in accordance with the prayer of said petition, and why your petitioner should not have such other and further relief in the premises as may be just and meet.

Respectfully submitted,

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Respondents.

PETITION FOR A WRIT OF MANDAMUS AND, IN THE ALTERNATIVE, PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner, Robert J. Quinn, individually and as Commissioner of the Chicago Fire Department, respectfully prays that a writ of mandamus issue, pursuant to 28 U.S. Code § 1651 and Rule 31 of the Rules of this Court, directed to the Honorable The United States Court of Appeals for the Seventh Circuit, the Honorable Tom C. Clark, Associate Justice (Retired) of the United States Supreme

Court, sitting by designation as a Judge of the United States Court of Appeals for the Seventh Circuit, the Honorable John S. Hastings, Senior Judge of said Court of Appeals, the Honorable John Paul Stevens, Circuit Judge of said Court of Appeals, the Honorable The United States District Court for the Northern District of Illinois, and the Honorable Frank J. McGarr, District Judge of said District Court, commanding said Court of Appeals to vacate the judgment entered by it in *Francis Muscare* v. *Robert J. Quinn, individually and as Commissioner, Chicago Fire Department,* No. 74-1460, on May 21, 1975 (rehearing denied, June 17, 1975), for the reason that said judgment exceeds the jurisdiction of the Court of Appeals and is void, in that in said judgment the Court of Appeals enjoined petitioner, a local government official, from suspending respondent Muscare, a civil service employee, from his position pursuant to the procedures authorized by Illinois Revised Statutes, 1973, ch. 24, par. 10-1-18, a state statute of statewide application, on the ground that said statute violates the due process of law guaranteed by the United States Constitution—a matter requiring to be determined by a three-judge district court, upon due notice to the governor and attorney-general of the state of Illinois, pursuant to U.S. Code, Title 28, §§2281, 2284, and further commanding said Court of Appeals to remand the said matter to the District Court with directions to convene a three-judge district court and try the case before it.

In the alternative, the petitioner, Robert J. Quinn, individually and as Commissioner of the Chicago Fire Department, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in this proceeding on May 21, 1975 (rehearing denied, June 17, 1975).

OPINIONS BELOW

The findings of fact, conclusions of law and judgment of the district court in favor of defendant-petitioner, entered orally on March 19, 1974 (rehearing denied, March 29, 1974), are unreported, but are reproduced in Appendix A.

The opinion of the court of appeals, filed on March 21, 1975, reversing the judgment of the district court, is reported at ..... F.2d ..... (7 Cir., 1975), and is reproduced in Appendix B.

The judgment of the court of appeals, entered May 21, 1975, is reproduced in Appendix C.

The order of the court of appeals, entered on June 17, 1975, denying the defendant's petition for a rehearing, is reproduced in Appendix D.

JURISDICTION

The judgment of the court of appeals was entered on May 21, 1975. On June 17, 1975, the court of appeals entered an order denying defendant's petition for a rehearing with suggestions for rehearing in banc.

A motion for a stay of the mandate pending application to this Court for a writ of certiorari was filed on June 19, 1975. On June 25, 1975, an order was entered by Circuit Judge Stevens, staying the mandate until July 24, 1975.

The jurisdiction of this Court herein rests on U.S. Code, Title 28, §§1254(1) and 1651.

QUESTIONS PRESENTED

1. Whether a single-judge district court or a court of appeals, in an appeal from a judgment of a single-judge district court, has jurisdiction to enjoin the enforcement of a state statute of statewide application, on the ground that it violates the United States Constitution.

2. Whether, in short suspensions of civil service employees, due process is satisfied by provision for post-suspension hearings, with the right to back pay and deletion of the suspension from the employee's service record, in the event the charges against the employee are disallowed.

3. Whether, in the event that due process requires a pre-suspension hearing, any administrative hearing must be held if the employee has actual knowledge of the charge against him, knows that he is in violation of a departmental rule and that the charge is based on that violation, and where the only disputed question is whether the rule is constitutional.

4. Whether a civil service employee, suspended without a trial-type pre-suspension hearing, can complain that he has been denied due process if he fails to exercise his statutory right to a post-suspension hearing, with the right to deletion of the suspension from his employment record and back-pay, in the event he rebuts the charges against him.

5. Whether a city fire department can constitutionally regulate the dress and hair style of its firefighters (1) to ensure the efficient operation of gas masks frequently required to be worn by firefighters, (2) to present a well-groomed and uniform appearance or image to the public, or (3) to promote discipline in a paramilitary setting.

6. Whether a city fire department can constitutionally promulgate general safety rules binding on all members of the department, even though they may not be actually necessary with respect to certain individual members.

CONSTITUTIONAL PROVISIONS, STATUTES AND ADMINISTRATIVE REGULATIONS INVOLVED

Constitution of the United States

Amendment I:

> "Congress shall make no law . . . abridging the freedom of speech. . . ."

Amendment V:

> "[N]or shall any person . . . be deprived of life, liberty or property, without due process of law."

Amendment XIV:

> ". . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

United States Code

Title 28, §§2281, 2284:

> "§2281. *Injunction against enforcement of State statute; three-judge court required.*
>
> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or

commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

"§2284. *Three-judge district court; composition; procedure.*

"In any action or proceeding required by an Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

"(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

"(2) If the action involves the enforcement, operation or execution of State statutes or State administrative orders, at least five days notice of the hearing shall be given to the governor and attorney-general of the State.

"* * * * *

"Such notice shall be given by registered mail or by certified mail by the clerk and shall be complete on the mailing thereof."

Title 42, §1983:

"Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Illinois Revised Statutes, 1973

Chap. 24, par. 10-1-18:

"Except as hereinafter provided in this section, no officer or employee in the classified civil service of any municipality who is appointed under the rules and after examination, may be removed or discharged or suspended for more than 30 days, except for cause upon written charges and after an opportunity to be heard in his own defense . . . Nothing in this Division 1 limits the power of any officer to suspend a subordinate for a reasonable period, not exceeding 30 days except that any employee or officer suspended for more than 5 days or suspended within 6 months after a previous suspension shall be entitled, upon request, to a hearing before the civil service commission concerning the propriety of such suspension. . . ."

Rules and Regulations of the Chicago (Illinois) Fire Department

Section 51.133:

"All members of the Chicago Fire Department shall present a clean and proper appearance in personal care and attire at all times. The face shall be clean-shaven, except that a non-eccentric mustache is permissible. Mustaches shall not extend beyond a line perpendicular to the corner of the mouth and the full upper lip must be readily visible. Sideburns shall be trimmed short and shall be no lower than a line from the middle of the ear.

"Hair shall be worn neatly and closely trimmed, and the hair outline shall follow the contour of the ear and slope of the back of the neck. It will be gradually tapered overall in order to present a neat appearance."

STATEMENT OF THE CASE

Respondent Francis Muscare has been a firefighter with the Chicago Fire Department since 1955. His present rank is that of lieutenant.

From October, 1973, until the trial of this case in March, 1974, Muscare wore a beard. He did this despite a departmental rule, the existence of which he admitted he was well aware, limiting the facial hair that may be worn by firefighters to at most a small moustache and precisely limited sideburns, with no beard.

Some three years before Muscare had worn the same sort of moustache and beard (R. 17, p. 97). He had been ordered to shave off the beard, but refused (R. 17, p. 98). In consequence, at a uniform inspection, his superior officer declined to inspect him and apparently he at length then brought himself into compliance by shaving.

The following year Muscare again grew a beard (R. 17, p. 99). This time he was summoned before a departmental board, where he was told by a fire chief that he did not know the meaning of discipline and was commanded to shave off his beard before reporting for duty the next day. Muscare reluctantly complied on that occasion also (R. 17, p. 100).

But in December, 1973, when Muscare appeared with his company at the Chicago Fire Academy for instruction in a two-day course in the use of self-contained breathing apparatus or safety masks, he was again wearing a beard. The instructor, Firefighter Leonard Johnson, later testified that he at that time, on the basis of the instructional ma-

terial, informed Muscare that facial hair should not be worn with the safety masks. Muscare disputed this, contending that Boston and New York permit firemen to wear "long hair, beards and moustaches." However, he offered no proof of that.

As Instructor Johnson explained at the trial (R. 17, p. 19), the self-contained breathing apparatus consists of an air cylinder, a face piece, a breathing tube and the harness, on which the tank is mounted. The whole apparatus can be carried on a man's back. The cylinder is charged to 2216 pounds of pressure per square inch and the gas mask can function for 30 minutes. The gas masks cost about $400 each (R. 17, p. 68).

Each member of the class was expected to put the apparatus on, charge it and test it to determine whether he was getting a good facial fit with the apparatus "charged" and with the cylinder and regulator valves open, allowing the high pressure air to flow up through the regulator into the face piece (R. 17, p. 9). Johnson stated he could tell, by watching a fireman do this, whether he had succeeded in obtaining a tight facial seal.

Muscare failed to charge or test his appartus in the class at the Fire Academy (R. 17, pp. 9, 27, 31).

On the second day of the class, each student was expected to walk up to the fifth floor of the Fire Academy and then back down to the first floor, with a gas mask on, sealed and functioning (R. 17, p. 29). Muscare did not do this and, in fact, did not even put the apparatus on (R. 17, p. 11).

Instructor Johnson stated at the trial that he did not know whether Muscare, while wearing his beard, could get

a good seal on a gas mask, because Muscare did not put the gas mask on and a gas mask can be tested only by a man putting it on and testing it (R. 17, p. 31).

After the class was concluded Instructor Johnson reported Muscare's conduct in the class to the drillmaster. According to his complaint, Muscare was "warned" in December, 1973 (R. 1, p. 2; A. 2) "that he would not be permitted to continue working as a firefighter unless he shaved his beard off" and that a few days later he was informed that charges had been filed against him with the administrative authorities of the Fire Department (R. 4, affidavit, p. 1). But, because of the serious illness of the superior officer in whose jurisdiction it lay to determine what disciplinary action, if any, should be taken, the charges against Muscare were not acted upon until February 27, 1974, by which time they had been reviewed and authorized by the Fire Commissioner (R. 17, p. 112).

Muscare was disciplined not only for violating the facial hair provisions of Section 51.133 of the Rules and Regulations of the Chicago Fire Department, but also for refusing to carry out a direct lawful order of his superior officers, in contravention of Section 61.006 of the same Rules and Regulations.

On February 27, 1974, three superior officers of Muscare personally came to the fire station where he was on duty and informed him that he had been suspended for 29 days, effective immediately.

Muscare did not exercise his statutory right, under Illinois law, to a hearing before the civil service commission. Illinois Revised Statutes, 1973, ch. 24, par. 10-1-18, provides:

> ". . . [A]ny employee or officer suspended for more than 5 days or suspended within 6 months after a previous suspension shall be entitled, upon request, to a hearing before the civil service commission concerning the propriety of such suspension. . . ."

In the event that the civil service commission finds the suspension unwarranted, the employee is entitled to reinstatement, back-pay and erasure of the suspension from his employment record.

Instead of seeking this administrative hearing, Muscare, on March 11, 1974, filed the instant civil rights action under 42 U.S.C. §1983.

The Trial in the District Court

At the trial on March 19, 1974, Muscare rested on his complaint and supporting affidavit (R. 17, p. 4). The defendant then put in almost all the testimony (R. 17, pp. 5-95, 108-115). Plaintiff testified only in a brief attempt to rebut (R. 17, pp. 96-108) defendant's case.

Acting Chief Fire Marshall William F. Foley of the Chicago Fire Department was a witness for the defendant (R. 17, pp. 67-95, 108-115). He explained that the department has used self-contained breathing apparatus or gas masks since 1958 (R. 17, p. 4). They are used particularly in rescue operations in a hostile environment and in an irascible type of atmosphere containing highly toxic, poisonous gas. They are usually worn only at the direction of the company officer. At present there are two such gas masks on each hook and ladder truck. All uniformed members of the Chicago Fire Department are required to be proficient in the use of such self-contained breathing apparatus (T. 73).

Safety, not appearance, Chief Foley declared, is the rationale for the departmental rule restricting the facial hair that may be worn by uniformed firemen to a small, precisely limited moustache and small, precisely limited sideburns, with no beard (T. 84). Facial hair in excess of these limitations, Chief Foley explained, interferes with the operation of the gas masks. In firefighting mistakes can be fatal.

A fire department is a paramilitary organization, Chief Foley also stated, because the department has levels of rank and firemen are expected to carry out orders. The fire department is a uniformed force, and cleanliness and neatness are a part of being uniformed.

Another witness for the defendant was Al Lundin, an officer of the Mine Safety Appliances Company, of Pittsburgh, manufacturers of personal protective devices and particularly of self-contained breathing apparatus used by the Chicago Fire Department. Mr. Lundin also taught a course in the use of such safety devices at the National Safety Council in Chicago, where he gave instruction in the basics of respiratory protection to a student body of safety directors in various companies throughout the United States (T. 46). Lundin declared it to be his expert opinion that facial hair would adversely affect the obtaining of a facial seal by self-contained breathing apparatus of the types used by the Chicago Fire Department. Lundin explained that a perfect seal is possible, so that, during tests with various odorants "it feels like there is absolutely no leakage at all." During tests the individual fireman is expected to be able to carry on normal activities, such as talking and coughing, with his face sealed in the mask.

But although the gas masks are designed to fit all faces, the differences in facial sizes and shapes, Lundin elucidated, can result in facial hair having less effect on obtaining a seal for some individuals than others. As he said, "it is very difficult to form a seal to the face under the best conditions, and facial hair is going to endanger that," and, as the fireman engages in varied strenuous activities during the course of a fire, the seal is apt to be more easily broken if facial hair is worn.

Therefore, it was Lundin's expert opinion, that facial hair would adversely affect the obtaining of a facial seal by self-contained breathing apparatus of the types used by the Chicago Fire Department (T. 15).

Plaintiff Muscare testified briefly by way of rebuttal. He stated he had been a member of the Chicago Fire Department almost 20 years. Muscare admitted he was familiar with the fire department regulation concerning facial hair and that he had read it at roll call. In fact, he volunteered the information that he had twice in the past been formally reprimanded for wearing a beard in violation of the rule, and that on each occasion he had complied by shaving it off.

Muscare affirmed that he had tested the apparatus while wearing a beard and that he had gotten a good fit and the apparatus worked. But he did not attempt to validate that assertion by a demonstration in the courtroom. Muscare presented no expert witnesses on gas masks. Nor did he put any other firemen on the witness stand to recount their experience with the department's gas masks while wearing facial hair.

The Opinion of the District Court

At the conclusion of the hearing on a preliminary injunction on March 19, 1974, District Judge Frank McGarr, in denying the application, entered oral findings of fact and conclusions of law (reproduced in Appendix A), which he later made applicable to his denial of a permanent injunction on March 29, 1974.

Judge McGarr affirmatively recognized that the wearing of facial hair is a form of expression protected by the First Amendment (R. 15, p. 3). He found that Muscare's appearance as depicted in the photographs (R. 1, Exhs. A, B) was substantially identical with his appearance in court (R. 15, p. 4). The court found that Muscare's small moustache was not in violation of departmental regulations, but that his full goatee, or small beard, was "clearly prohibited" by Regulation 51.133 of the Chicago Fire Department.

The question presented, the court stated, is "whether this regulation is a violation of the plaintiff's rights to First Amendment expression or whether, in fact, it is a reasonable curtailment of his rights for some justifiable and good reason which the Department advances" (R. 15, pp. 3, 4).

Judge McGarr did not regard as determinative the evidence as to whether Muscare's facial hair actually did or did not interfere with his effective personal use of a gas mask. The court declared (R. 15, p. 5):

> "What we have before us is the validity of a regulation and its reasonableness generally. And the question of whether it is reasonable in terms of the individual context, which was raised here, I don't think is relevant."

The safety reason for the regulation, which the department advanced in its justification, the court found adequate to sustain the regulation's constitutionality—whether or not safety was indeed the basic reason for the adoption of the regulation. For this reason, Judge McGarr concluded that the regulation is merely "[a] minor abridgement of personal liberty, which is justified by safety requirements" (R. 15, p. 6).

The court expressly refrained from assessing the substantiality of the public image and paramilitary discipline rationales the department also urged.

Nor did the district court rule on the question of whether the department's suspension procedure provided due process. That issue was raised in the complaint (R. 1, pp. 1, 5, 6). But the plaintiff offered no evidence in support of that contention and apparently neglected to urge the issue at the trial.

Denial of Plaintiff's Motion for Reconsideration

In a motion filed March 26, 1975 for reconsideration or amendment of the judgment (R. 12, 13), plaintiff argued that "even where the State can reasonably assert that a legislative regulation accurately applies to most people falling into a classification, when a case-by-case determination is available, the due process clause requires such an individualized determination." (R. 13, p. 4). Averring (p. 5) that "[s]uch a test is not merely available; it is currently in use," plaintiff contended that "where, as here, the general rule invades a fundamental constitutional right, such a general regulation is unconstitutional."

The motion also maintained (p. 7) that plaintiff had been denied due process on the basis of his unproven as-

sertions that he had been "cut off from his job" "[w]ithout notice of the charges against him, without an opportunity to be heard in his own defense."

On March 29, 1974, the district court denied plaintiff's motion for reconsideration or amendment of its judgment.

The Per Curiam Opinion of the Seventh Circuit

The per curiam opinion of the U.S. Court of Appeals for the Seventh Circuit, filed May 21, 1975, refrained from attempting to resolve the question of the constitutionality of the fire department's regulation of the facial hair of firemen (App. B3), on the ground that it found Muscare had been "suspended without procedural due process."

The court of appeals reached this result despite its finding (App. B4) that Muscare's superior officer, Chief Morgan, had in December, 1973, "warned him that he would not be permitted to continue working as a firefighter unless he shaved off his beard" and that, a few days thereafter, Muscare "was informed that charges had been filed against him with the administrative authorities." The opinion also found that two and a half months elapsed after that before Muscare was suspended.

The opinion also disallowed the constitutional adequacy of the provision in Illinois Revised Statutes, 1973, ch. 24, par. 10-1-18, for a post-suspension hearing before the civil service commission concerning the propriety of the suspension, available in cases of suspensions of more than 5 days—a right Muscare had failed to exercise.

The court of appeals ruled that "post-suspension review is insufficient," although it specifically admitted (App. B5) that the Illinois Supreme Court had recently held to the

contrary in *Kropel* v. *Conlisk*, 60 Ill. 2d 17 (decided January 30, 1975).

The per curiam opinion stated (App. B6) that it considered the decision in *Goss* v. *Lopez*, ... U.S. ....., 42 L. ed. 2d 725 (decided January 22, 1975), determinative in resolving the instant case. Recognizing that Muscare had a protected property interest in his employment, the court of appeals applied the rationale of *Goss* in the following terms (App. B6):

> "In the circumstances of America's high schools, the Court thought that notice, an explanation of the evidence the authorities have, and an opportunity to present his side of the story were sufficient to protect the student, and we think that at least this much is required in the circumstances of a public employee's suspension."

In addition, the per curiam opinion (App. B7, 8) found confirmation of its view in *Arnett* v. *Kennedy*, 416 U.S. 134 (1974).

The opinion did recognize (App. B8) that, in a wide variety of emergency situations, "where harm to the public is threatened, and the private interest is reasonably deemed to be of less importance, an official body can take summary action pending a later hearing." But the court made no attempt to clarify in what sort of specific situations disciplinary action could be taken without a pre-suspension hearing.

The City's petition for rehearing, with suggestions for rehearing in banc, was duly filed on June 4, 1975, and denied on June 17, 1975.

On June 25, 1975, Circuit Judge Stevens entered an order staying the mandate of the Seventh Circuit until July 24, 1975.

REASONS FOR GRANTING A WRIT

I.

THE JUDGMENT OF THE COURT OF APPEALS IS VOID.

IT ENJOINED SUSPENSION OF A CIVIL SERVICE EMPLOYEE PURSUANT TO A STATE STATUTE OF STATEWIDE APPLICATION.

SUCH AN ORDER IS WITHIN THE EXCLUSIVE JURISDICTION OF A THREE-JUDGE DISTRICT COURT, WITH THE RIGHT OF DIRECT APPEAL TO THIS COURT.

The complaint (R. 1) filed sought to enjoin the suspension of plaintiff by the Chicago Fire Department for violation of its grooming regulations on the ground that the regulations violated the United States Constitution. It was also alleged in that pleading that his suspension "without any prior notice or opportunity for a hearing" violated plaintiff's right to due process of law guaranteed by the federal constitution (R. 1, p. 5).

The plaintiff did not ask for the convening of a three-judge district court. It is possible that one was not required as plaintiff's case was stated at that juncture, since the injunction sought was only against enforcement of a local regulation by defendant, a local official. *Ex parte Collins,* 277 U.S. 565, 72 L.Ed. 990 (1920); *Petition of Public National Bank of New York,* 278 U.S. 101, 73 L.Ed. 202 (1928); *Wilentz* v. *Sovereign Camp, W.O.W.,* 306 U.S. 573, 83 L. Ed. 994 (1939).

The hearing on the preliminary injunction (R. 17, pp. 1-115) did not touch on the alleged denial of due process,

nor did the oral findings of fact, conclusions and opinion of the district court in denying a preliminary injunction (R. 13, "Excerpt," pp. 1-7, R. 14), later made applicable in the district court's denial of a permanent injunction (R. 14).

However, in the court of appeals attention was focused on the due process issue. More than three pages of the appellant's brief (pp. 20-23) was devoted to an argument that Muscare had been suspended without an opportunity to respond to the charges against him prior to being suspended and that he therefore had been denied due process. The appellee's brief (pp. 24-26) pointed out that plaintiff did not receive an administrative hearing on his suspension only because he himself failed to exercise his statutory right to such a hearing. The statute thus referred to is Illinois Revised Statutes, 1973, ch. 24, par. 10-1-18—a state statute of statewide application. This provides, as previously noted, that a civil service employee suspended for not more than 30 days, but for more than 5 days, is "entitled, upon request, to a hearing before the civil service commission concerning the propriety of such suspension."

The reply brief of the appellant (pp. 11, 12) acknowledged that "[u]nder Ill. Rev. Stat., ch. 24, §10-1-18, Illinois Law does provide that after his suspension, Plaintiff had the right to request a hearing before the Civil Service Commission to look back on the impropriety of such a suspension." But the reply brief maintained that "no such remedies after the fact could afford him the kind of due process to which he is entitled under the United States Constitution."

In advancing this contention, Muscare attacked the constitutionality under the federal constitution of a state statute of statewide application. In seeking to enjoin his sus-

pension, which had been effected under this statewide statutory procedure, Muscare was seeking to enjoin a local official proceeding under state legislation embodying a policy of statewide concern and application.

The court of appeals agreed with the appellant that Ill. Rev. Stat. 1973, ch. 24, par. 10-1-18, did not satisfy due process and, on that ground, reversed the district court's denial of an injunction against Muscare's suspension pursuant to that state statute.

Title 28, §2281, of the United States Code provides:

> "*§2281. Injunction against enforcement of State statute; three-judge court required.*
>
> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application thereof is heard and determined by a district court of three judges under section 2284 of this title."

A three-judge court is properly convened where a state statute applying generally to all local officials of a given type is challenged on federal constitutional grounds in an injunction proceeding brought against a local official of the type described in the statute. *Sailors* v. *Board of Education of the County of Kent,* 387 U.S. 105, 107 (1967); *Spielman Motor Sales Co.* v. *Dodge,* 295 U.S. 89 (1935).

Where a three-judge district court is required, that requirement is jurisdictional. As this Court stated in *Kennedy* v. *Mendoza-Martinez,* 372 U.S. 144, 154 (1963):

> "The legislative history of §2282 and of its complement, §2281, requiring three judges to hear injunctive suits directed against federal and state legislation, respectively, indicates that these sections were enacted to prevent a single federal judge from being able to paralyze totally the operation of an entire regulatory scheme, either state or federal, by issuance of a broad injunctive order."

Chief Justice Hughes declared in *Stratton* v. *St. Louis S.W. Ry. Co.,* 282 U.S. 10, 15 (1930):

> "If an application for an interlocutory injunction is made and pressed to restrain the enforcement of a state statute, or of an administrative order made pursuant to a state statute, upon the ground that such enforcement would be in violation of the Federal Constitution, a single judge has no jurisdiction to entertain a motion to dismiss the bill on the merits. He is as much without power to dismiss the bill on the merits, as he would be to grant either an interlocutory or a permanent injunction. His authority is strictly limited to granting, upon proper cause being shown, a temporary restraining order to be effective only pending the determination of the application for an interlocutory injunction. Upon making such an order, it is his duty to call two other judges, as the statute directs, to assist him in hearing and determining that application. *Ex parte Northern Pacific Railway Co.,* 280 U.S. 142, 144."

Under Title 28, §2284 of the U.S. Code, it is also provided:

> "(2) If the enactment involves the enforcement, operation or execution of State statutes or State administrative orders, at least five days notice of the hearing shall be given to the governor and attorney-general of the State.
>
> "• • • • •

"Such notice shall be given by registered mail or by certified mail by the clerk. . . ."

That requirement was also not complied with in the instant case.

It makes no difference that none of the parties requested the convening of a three-judge district court. It is the duty of the district judge, on receiving an application for an injunction to restrain enforcement and operation of a state statute, upon the ground of its federal unconstitutionality, himself to initiate the necessary procedures for the setting up of a three-judge district court. *Borden Company* v. *Liddy,* 309 F.2d 871, 876 (8 Cir., 1962).

As the Tenth Circuit declared in *Riss & Co.* v. *Hoch,* 99 F.2d 553, 555 (10 Cir., 1938), a case in which the parties had stipulated to a single-judge court:

> "The requirement of a three-judge court is not a mere privilege or right which the parties may waive. It is a jurisdictional requirement.
>
> "Accordingly, where a court of three judges should have been convened, and was not, this Court may issue a writ of mandamus to vacate the order or decree entered by the district judge and directing him, or such other judge as may entertain the proceeding, to call to his aid two other judges for the hearing and determination of the application for an interlocutory injunction." *Stratton* v. *St. Louis Southwestern Ry. Co.,* 282 U.S. 10, 16 (1930), citing *Ex parte Metropolitan Water Co.,* 220 U.S. 539 (1911), and *Ex parte Northern Pacific Ry. Co.,* 280 U.S. 142, 144 (1929).

It follows from the above that, since the judgment of the single-judge district court was beyond its jurisdiction and void, no appeal lay to the court of appeals. The case should have been heard by a three-judge district court, with the statutory right of direct appeal to this Court.

The petitioner requests this Court to vacate the void judgments of the district court and of the court of appeals herein and to issue its writ of mandamus, directing the district judge to bring about the convening of a three-judge district court to consider and determine this controversy in the proper manner.

II.

THE RULING OF THE SEVENTH CIRCUIT HEREIN IS IN DIRECT CONFLICT WITH THE DETERMINATION OF THE SAME ISSUE BY THE ILLINOIS SUPREME COURT.

BECAUSE OF THE PUBLIC IMPORTANCE OF THE QUESTION, THIS CONFLICT REQUIRES RESOLUTION BY THIS COURT.

In the event that this Court sees fit to disallow petitioner's application for a writ of mandamus, there is ample ground for the issuance of a writ of certiorari for a review by this Court of the merits of the controversy.

The per curiam opinion of the Seventh Circuit is in direct conflict with the opinion of the Illinois Supreme Court in *Kropel* v. *Conlisk*, 60 Ill. 2d 17 (decided January 30, 1975), as the court of appeals itself recognized (App. B5).

Kropel examined the constitutionality of the summary suspension procedures of the Chicago Police Department, which are similar to those of the Chicago Fire Department and, like those, established by state statute (Sections 10-1-18 (all civil service employees except Chicago police) and 10-1-18.1 (Chicago police) of the Illinois Municipal Code (Ill. Rev. Stat. 1973, ch. 24, par. 10-1-18, 10-1-18.1)). These provide:

(1) A classified civil service employee of a municipality may not be discharged or suspended for more than

30 days, except for cause upon written charges and *after* an opportunity to be heard in his own defense;

(2) Employees may be suspended by their superiors for a reasonable period, but not exceeding 30 days; but

(3) Employees suspended for more than 5 days, or suspended more than once within 6 months, are entitled, *upon request,* to a hearing before the civil service commission concerning the propriety of the suspension. (Emphasis supplied.)

The Illinois Supreme Court in *Kropel* authoritatively interpreted these statutory provisions of state law thus (60 Ill. 2d at 26, 27):

> "It is clear from all the statutes and rules . . . that a major difference between a suspension for less than 30 days and a suspension for more than 30 days is that the latter requires a hearing *before* the sentence can be imposed. In effect, the department has the duty to go into a hearing and prove its case for suspension of more than 30 days. *In the former instance the burden is on the employee to seek review* and establish why the suspension is unwarranted." (Emphasis supplied.)

The Circuit Court of Cook County, Illinois, had (like the Court of Appeals for the Seventh Circuit subsequently), found the provision for suspensions not exceeding 30 days, without a pre-suspension hearing, unconstitutional. In reversing the Circuit Court of Cook County, the Illinois Supreme Court interpreted the statute as providing for "some manner of review for suspensions for less than 30 days" (60 Ill. 2d at 26).

The Illinois Supreme Court recognized that even short suspensions "have a substantial economic impact on the employee" (60 Ill. 2d at 21) and ruled (*id.*):

> ". . . [I]t is implicit in the language of the statute that if the employee is vindicated at the hearing, the commission shall enter such orders as to ensure the employee does not suffer monetarily from the suspension or professionally by the unrefuted allegations against him on his work record."

The provisions for review of suspension of 30 days or less, with the right to reinstatement and back-pay in the event the employee is vindicated, satisfies due process, in the considered judgment of the Illinois Supreme Court, authoritatively interpreting applicable state law in such manner as to safeguard its constitutionality.

In so holding, the Illinois Supreme Court reached the same conclusion as that of the majority of the justices of this Court in *Arnett* v. *Kennedy,* 416 U.S. 134 (1974), who ruled that due process does not require a pre-discharge hearing (*a fortiori,* does not require a pre-suspension hearing).

Despite this, the Seventh Circuit has placed itself in direct conflict with the highest court of Illinois concerning the construction of, and application of the federal Constitution to, a state statute of statewide application.

Resolution of this conflict is clearly a matter of public importance. The issue can be clarified only by this Court. Until it is, the myriad of minor disciplinary cases arising among the more than 40,000 employees of the City of Chicago and, indeed, among the several hundred thousand state and local governmental employees in Illinois, will be carried on amidst uncertainty and confusion.

This, in itself, constitutes a valid reason for the granting of certiorari by this Court. Stern and Gressman, Supreme Court Practice (1969 ed.), p. 163, sec. 4.9.

III.

THE DECISION OF THE SEVENTH CIRCUIT IS ALSO IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT.

(1) The per curiam opinion of the court of appeals (App. B7, 8) endeavored to find confirmation of its own analysis of the question herein presented in this Court's disposition of *Arnett* v. *Kennedy,* 416 U.S. 134 (1974). That effort was based on a misreading of *Arnett* v. *Kennedy,* with which the opinion of the Seventh Circuit is in direct conflict.

In *Arnett,* it will be recalled, a majority of five justices held that due process is satisfied by administrative procedures which provide for a post-removal hearing, with the right to reinstatement and backpay if the removal decision is later found to have been wrongful.

Kennedy was a nonprobationary federal civil service employee, who was dismissed from his position in the Office of Economic Opportunity for allegedly making recklessly false and defamatory statements about other employees of that agency. Instead of pursuing his administrative remedy under civil service regulations, which afforded him the right to reply to charges and required that the material on which his dismissal was based be made available to his inspection, Kennedy brought a civil action for declaratory and injunctive relief. He contended that he was entitled to a trial-type pre-removal hearing before an impartial hearing officer. A three-judge district court agreed with him.

This Court rejected Kennedy's contention and reversed the district court in a 5-4 decision. It will be recalled that of the five justices in the majority, a plurality of three—

the Chief Justice and Justices Stewart and Rehnquist—were of the opinion that the employee's rights were limited to those afforded by the Lloyd-LaFollette Act of 1913 (5 U.S. §7501), which expressly states "no examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer making the removal." The plurality of three, speaking by Justice Rehnquist, felt that the due process clause does not require any pre-removal procedure beyond that embodied in whatever statute created the expectancy of job retention.

Two justices—Justices Blackmun and Powell—reached the same "conclusion on the basis of different reasoning" (at 164). Balancing the property rights of the individual employees in their jobs against the interest of the government in having the discretion expeditiously to remove employees who hinder efficient operation, they held that the due process requirements of notice and hearing were satisfied by the statutory provision for a post-removal evidentiary hearing, with reinstatement and back pay should the removal decision be proven to have been wrongful.

In rejecting the contention that due process requires a pre-removal hearing, Justice Powell observed (at 168):

> "Prolonged retention of a disruptive or other unsatisfactory employee can adversely affect discipline and moral in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency. Moreover, a requirement of a prior evidentiary hearing would impose additional administrative costs, create delay, and deter warranted discharges. Thus, the Government's interest in being able to act expeditiously to remove an unsatisfactory employee is substantial."

A sixth member of the Court, Justice White, was of the opinion that, while a property interest in public employment was created by statute, the requisites of due process are defined not by statute, but by the Constitution. He was of the view that due process requires a hearing at some time before the discharge becomes final, but this need not be a trial-type hearing and it need not occur before the discharge becomes effective. It is sufficient if there is some kind of a hearing at some time (416 U.S. at 178). However, Justice White concluded that Kennedy had been denied due process because the hearing officer was the person Kennedy was charged with having slandered. Thus, Justice White concurred in part, dissented in part.

Three justices—Douglas, Brennan and Marshall—wholly dissented, being of the opinion that due process requires a trial-type pre-discharge (or pre-suspension) hearing.

The Seventh Circuit has misread *Arnett* v. *Kennedy* by erroneously attributing to Justices White, Blackmun and Powell the opinion that a pre-discharge (or pre-suspension) hearing must be had to satisfy due process, and by also mistakenly attributing to Justice White the view that a trial-type hearing is required.

(2) *Goss* v. *Lopez*, ... U.S. ....., 42 L.Ed. 2d 725 (1975), is claimed by the Seventh Circuit to be determinative of the result it reached in this case. The per curiam opinion declares (App. B6):

> "Though *Goss* is a 'school' case, it nevertheless points the way to our resolution of the present case."

In like manner, in denying the petition for rehearing, the court of appeals attributed its conclusion to *Goss* (App. D), which it again interpreted as mandating a pre-suspension hearing.

Goss, however, actually stands for the proposition that a public school student cannot be suspended or expelled unless he is granted a hearing either before or promptly after suspension or expulsion. In so ruling the Court was affirming a three-judge district court, which had held that the plaintiff students had been denied due process because they had been suspended without a hearing before or after. And Justice Powell, in dissenting, so understood the opinion of the majority in *Goss*, which he described in the following terms (42 L.Ed. 2d at 741):

> "The Court . . .justifies this unprecedented intrusion into the process of elementary and secondary education by identifying a new constitutional right: the right of a student not to be suspended for as much as a single day without notice and a due process hearing either before or promptly following the suspension."

Indeed, the majority opinion of Justice White in *Goss* recognized (42 L.Ed. 2d at 737) that:

> ". . . [T]he interpretation and application of the Due Process Clause are intensely practical matters and . . . 'the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.' *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 895 (1961)."

Actually *Goss*, in the context of the school situation, came to a result closely paralleling the conclusion, in an employment context, of the Illinois Supreme Court in *Kropel* v. *Conlisk*, 60 Ill. 2d 17 (1975), which interpreted the Illinois statute as requiring a hearing in the suspension of any civil service employee for 30 days or less, if the employee requests it, promptly after the suspension, with the right to backpay and correction of his employment record, if the employee is vindicated.

IV.

IN FACT, MUSCARE HAD AMPLE NOTICE OF THE CHARGES AGAINST HIM AND DID RESPOND TO THEM.

FURTHERMORE, MUSCARE ADMITTEDLY WAS IN VIOLATION OF DEPARTMENTAL REGULATIONS AND ADMITTEDLY DISOBEYED AN ORDER OF HIS SUPERIOR OFFICER.

THE ONLY ISSUES TO BE SETTLED WERE WHETHER THE REGULATIONS AND ORDER WERE CONSTITUTIONAL AND THESE QUESTIONS COULD NOT BE DETERMINED IN AN ADMINISTRATIVE HEARING.

THESE ISSUES WERE JUDICIALLY DETERMINED. MUSCARE RECEIVED DUE PROCESS IN ABUNDANCE.

Paragraph 9 of the complaint filed by Muscare alleges (R. 1, p. 3):

> "9. Section 51.133 of the Rules and Regulations of the Chicago Fire Department provides as follows:
>
> "Section 51.133. Proper Personal Appearance . . . The face shall be clean-shaven, except that a non-eccentric mustache is permissible. Mustaches shall not extend beyond a line perpendicular to the corner of the mouth and the full upper lip must be readily visible."

Paragraph 11 of the complaint (R. 1, p. 4) states:

> "11. Section 61.006 of the Rules and Regulations of the Chicago Fire Department provides as follows:
>
> "Part VI
>
> "Offenses, Procedures And Penalties In Respect To Violation Of The Rules And Regulations, Practices And Procedures Of The Chicago Fire Department
>
> "• • •
>
> "Section 61.006. Disobedience of Orders."

Exhibits A and B, attached to Muscare's complaint (R. 1) portray Muscare, front-view and side-view, wearing a goatee or beard, i.e. a vigorous growth of facial hair.

Paragraph 5 of the complaint (R. 1, p. 2) avers:

> "5. In December, 1973, Plaintiff's superior officer, Chief Morgan, warned him that he would not be permitted to continue working as a fire fighter unless he shaved his beard off. A few days thereafter Plaintiff was informed that charges had been filed against him with the administrative authorities of the Fire Department."

Paragraph 6 of the complaint (R. 1, p. 2) states that it was not until "two and one-half months later, on Wednesday, February 27, 1974" that Muscare was suspended for 29 days.

Muscare's only defense is that the pertinent departmental regulations and the order of his superior officer that he disobeyed were unconstitutional. But the commissioner of the Chicago Fire Department and the civil service commission have no jurisdiction to decide constitutional questions.

Muscare did not exercise his statutory right to an administrative review of his suspension. Instead, he filed this civil rights action in federal court. An evidentiary hearing was conducted by the district court on the constitutional questions and judgment entered upholding the validity of the departmental grooming regulation and, in consequence, the validity of the order enforcing it.

Muscare was afforded due process in abundance on the only issues in controversy.

V.

THE RULING OF THE DISTRICT COURT THAT LIMITING THE LENGTH OF A FIREMAN'S FACIAL HAIR FOR REASONS OF SAFETY IS CONSTITUTIONAL SHOULD BE UPHELD BY THIS COURT.

The decision of the district court that the rule limiting the length of a fireman's facial hair is constitutional is in accord with the great weight of authority, as indeed is clear from the per curiam opinion of the court of appeals (App. B3, n. 2), which cites *Stradley* v. *Anderson,* 478 F. 2d 188 (8 Cir., 1973), *Yarborough* v. *City of Jacksonville,* 363 F. Supp. 1176 (MD, Fla. 1973); *Akridge* v. *Barres,* 321 A. 2d 230 (NJ, 1974); *Hordowich* v. *Board of Police and Fire Commissioners,* 18 Ill. App. 3d 20 (1974); *Michini* v. *Rizzo,* 379 F. Supp. 837 (ED, Pa. 1974), affd. ..... F.2d ..... (3 Cir., March 24, 1975); *Manco* v. *Town of Irvington,* 313 A. 2d 219 (NJ, 1973), aff'd., 313 A. 2d 204 (NJ, 1974), as upholding the validity of such rules. The same conclusion was also arrived at in the more recent case of *Marshall* v. *District of Columbia,* 392 F. Supp. 1012, 43 L.W. 2418 (DC, DC, April 1, 1975).

Yet the court of appeals failed to reach the question of the constitutionality of the facial hair regulation (App. B3), in effect vacating the judgment of the district court on the real issue in any hearing on Muscare's suspension, without disallowing the cogency of the district court's findings and conclusion.

The district court had upheld the facial hair prohibition on the ground that the evidence established that the regulation was justified by considerations of safety applicable generally. It ruled that the factual question whether or not

Muscare could individually obtain a good seal on a gas mask despite his facial hair was irrelevant. (R. 15, p. 5; App. A5).

The court of appeals failed to recognize the general nature of a departmental regulation, its general applicability despite individual differences. Instead, it found (App. A4) that Muscare had asserted he had never experienced any difficulty in getting a good seal on a gas mask while wearing a beard (an assertion Muscare refrained from attempting to demonstrate to his superiors or at the trial). The per curiam opinion of the court of appeals seems to imply that this imposed a burden of proof on the department to establish that Muscare individually could not get a good gas mask seal while sporting whiskers.

Such lapses of common sense, resulting from judicial (but lay) intervention in the day-to-day operation of a large metropolitan fire department, also merit review by this Court.

CONCLUSION

For the foregoing reasons, a writ of mandamus should issue, directing that the judgments below be vacated and the case tried before a three-judge district court, with the right of direct appeal to this Court.

In the alternative, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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July 21, 1975

APPENDIX A

1 IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

Tuesday, March 19, 1974 2:00 o'clock p.m.
Before the Honorable FRANK J. MCGARR, *Judge*

• • • • •

2 The Court: We are considerably beyond the close of the trial day. Questioning has been broad and in many respects argumentative on both sides. And the areas of argument toward which the questions are directed and are easily inferred. And for this reason I would not require a final argument, which would carry the matter over until tomorrow.

The determination of the application or denial of the application for a preliminary injunction requires that I state certain findings of fact and conclusions of law. Because the matter is simple, I will not require the parties to submit them to me in the form of proposals, but will rather announce findings of fact and conclusions of law now, from the bench, and you may regard my remarks as compliance with the Rule.

Let me first say that I do find that I have jurisdiction in the matter.

And let me note, secondly, the only piece of original research that I have been able to do is the dictionary definition of "goatee", which seems to have become significant in the case. Webster's Seventh New Collegiate Dictionary—which was the first one at hand—says that a goatee is "a small, trim, pointed or tufted
3 beard on a man's chin." As I speculate on this, it seems

to me that it is obvious that a goatee is a beard and that the significance of the word is that it is certain type of a beard, characterized by smallness and, perhaps, by the fact that it is pointed.

I think the decisions make it clear that facial hair is a form of expression protected by the First Amendment.

The evidence makes it clear that the Fire Department regulations prohibit facial hair, except for noneccentric moustaches.

I note that the plaintiff has a small moustache, as evidenced in the photographs attached to his pleadings; and as evidenced by his personal appearance here in court. Which moustache is obviously not eccentric and obviously not a violation of the regulations. And, therefore, obviously not relevant in the case we have here.

The plaintiff also has a rather full goatee or small beard, which is clearly a type of facial hair prohibited by the Fire Department regulations.

The question, therefore, becomes whether the regulations prohibiting the goatee—which is obviously the reason for the suspension, and I so find—whether this regulation is a violation of the plaintiff's rights to
4 First Amendment expression or whether, in fact, it is a reasonable curtailment of his rights for some justifiable and good reason which the Fire Department advances.

The comments I make concerning the goatee in question need not be too detailed for the reason that the plaintiff was good enough to attach to his pleadings a photograph. And I merely make the finding that the appearance of the plaintiff in the photograph is substantially identical to his appearance here in court today.

The plaintiff's hair and sideburns can, with some slight stretching, be deemed to be in compliance with Fire Department regulations. Which, once again, reaffirms my contention that the only issue is whether the goatee or small beard was the reason for the suspension and whether that suspension was justifiable under the circumstances.

I find that the plaintiff was suspended for twenty-nine days, by virtue of a notice dated February 28, 1974; and that the suspension notice alleges violations of Regulation 61.001, 61.006 and 51.133 of the Fire Department regulations.

The two regulations in the 61 series are general and are not deemed by me, at least, to be relevant or per-
5 tinent to the issues here.

Regulation 51.133 focues on the precise issue, in that it relates to hair. It is titled "Personal Appearance", but relates almost entirely to hair and refers to haircuts, moustache, sideburns and beard.

I find that the plaintiff's facial hair or his goatee violates Regulation 51.133.

There has been evidence as to whether Lt. Muscare's facial hair does or does not interfere with the proper fit and seal of a face mask or for a breathing apparatus.

What we have before us is the validity of a general regulation and its reasonableness generally. And the question of whether it is reasonable in terms of the individual context, which was raised here, I don't think is relevant.

Neither, as we have said before, is the eccentric moustache issue relevant here, inasmuch as I find Lt. Muscare's moustache is not eccentric, and falls within the permissible moustache rules of the Fire Department.

I am not addressing myself in this ruling at all to the issue of whether the Fire Department have dress and appearance code, solely for uniformity and the
6 impression made on the public by what has been called a paramilitary organization. I set that issue aside, as one which need not be considered here.

The question here is whether we have a justifiable regulation on the basis of which the Fire Department purports to justify it. The Fire Department justifies it on safety grounds and relates to face mask fit for self-contained breathing apparatus as the basic reason for the regulation. If it is—whether it is the basic reason or not, or whether it is the only reason or not, really I find that if it is a reason, I need not go any further.

After hearing the evidence, examining the exhibits, I find the justification of the Fire Department, that is, the requirement limiting facial hair for reasons of safety related to the fit of the face mask of self-contained breathing apparatus, is neither capricious or arbitrary justification. It appears to be grounded in reason. And it also appears to involve a minor abridgement of personal liberty, which is justified by safety requirements.

Fortunately, for the Court, I am not required to become an instant expert on self-contained breathing apparatus. I am required only to determine under law
7 whether the defense rationale and justification for this regulation is reasonable. And in the context of safety, I find that it is.

The plaintiff's motion for a preliminary injunction, therefore, is denied.

• • • • •

APPENDIX B

In the

United States Court of Appeals

For the Seventh Circuit

Before CLARK, *Associate Justice**, HASTINGS, *Senior Judge*, and STEVENS, *Circuit Judge*.

PER CURIAM. Appellant-Muscare, a fireman with the Chicago Fire Department since 1955, was suspended from his duties for a 29-day period from February 27 to March 28, 1974, on the ground that his "goatee" violated

* Associate Justice Tom C. Clark, United States Supreme Court (Ret.) is sitting by designation.

the Department's hair regulations.[1] On March 11, 1974, appellant filed a complaint in the United States District Court for the Northern District of Illinois seeking injunctive relief and claiming that his constitutional right to determine his personal appearance had been violated. The district court held a hearing on the matter and denied relief.

On this appeal, Lt. Muscare strenuously argues that this circuit's decision in *Breen v. Kahl*, 419 F.2d 1034 (7th Cir. 1969), cert. den., 398 U.S. 937 (1970), compels a recognition of the "right to wear one's hair at any length or in any desired manner [as] an ingredient of personal freedom protected by the United States Constitution," 419 F.2d at 1037, and requires an invalidation of the Department's regulation, absent any showing of "substantial justification" for the restrictions. The Department argues that its regulation can be justified on the basis of: (1) the need to insure the efficient operation of gas masks which must at times be worn by fire-fighters; (2) the need for discipline in a paramilitary setting; and (3) the need to present a well-groomed and uniform appearance or image to the public. The sufficiency of these various rationales is a

[1] Section 51.133 of the Rules and Regulations of the Chicago Fire Department provides:

> Section 51.133, PROPER PERSONAL APPEARANCE
>
> All members of the Chicago Fire Department shall present a clean and proper appearance in personal care and attire at all times. The face shall be clean-shaven, except that a non-eccentric mustache is permissible. Mustaches shall not extend beyond a line perpendicular to the corner of the mouth and the full upper lip must be readily visible. Sideburns shall be trimmed short and shall be no lower than a line from the middle of the ear.
>
> Hair shall be worn neatly and closely trimmed, and the hair outline shall follow the contour of the ear and slope to the back of the neck. It will be gradually tapered overall in order to present a neat appearance.

matter of considerable dispute in the decided cases;[2] however, we find it unnecessary to resolve that controversy in this case, for appellant was suspended without procedural due process.

It appears that appellant's goatee first came to the attention of his superiors in December 1973, when Lt. Muscare, along with the rest of his company, attended a class at the Chicago Fire Academy, taught by one Leonard Johnson, a drill instructor, to train firefighters in the use of self-contained breathing apparatus. At that time, Instructor Johnson, using instructional materials which had been provided him, informed Lt. Muscare's company that facial hair should not be worn with the

[2] Some courts have upheld hair regulations solely on the basis of "paramilitary" discipline or the need to present a well-groomed image to the public, *see Stradley v. Anderson*, 478 F.2d 188 (8th Cir. 1973) (police); *Yarborough v. City of Jacksonville*, 363 F. Supp. 1176 (M.D. Fla. 1973) (firemen); *Akridge v. Barres*, 122 N. J. Super. 476, 300 A. 2d (1973), aff'd, 65 N.J. 266, 321 A. 2d 230 (1974) (police); *Matter of Greenwald v. Frank*, 70 Misc. 2d 632, aff'd 40 A.D.2d 717 (1972) (police); *cf. Anderson v. Laird*, 437 F.2d 912 (7th Cir. 1971) (National Guard); other courts, however, have rejected this view, *see Owen v. Barry*, 483 F.2d 1126 (2d Cir. 1973) (police); *Black v. Rizzo*, 360 F. Supp. 648 (E.D.Pa. 1973) (distinguishing between police and firemen). More recently, fire departments across the country have begun to justify hair regulations on the basis of safety considerations, in particular, the efficient use of gas masks. Though fundamentally a fact question, most courts have accepted this theory, *see Michino v. Rizzo*, 379 F. Supp. 837 (E.D.Pa. 1974), aff'd (3d Cir., decided March 24, 1975); *Hordorwich v. Bd. of Police and Fire Comm'rs*, 18 Ill. App.3d 20 (1974); *Manco v. Town of Irvington*, 126 N.J. Super. 148, 313 A.2d 219 (1973), aff'd, 64 N.J. 142, 313 A. 2d 204 (1974); *Olszewski v. Council, Fire Dept.*, 70 Misc. 2d 603 (1972). Only a few courts have found no basis for this justification, *see Lindquist v. City of Coral Gables*, 323 F. Supp. 1161 (S.D. Fla. 1971); *Hunt v. Bd. of Fire Comm'rs*, 68 Misc. 2d 261, 327 N.Y. S. 2d 36 (1971). In passing, we note but without holding that the challenged hair regulation, §51.133, does not appear to be co-extensive with the need for safe and efficient use of gas masks and, if that is the sole justification, might well be more narrowly drawn.

self-contained breathing apparatus, since hair prevented the wearer from obtaining a proper seal on the mask portion of the apparatus. Appellant disputed this, saying: "Boston and New York have men with long hair, beards and mustaches, and they are not concerned about it."

During the course of instruction, each member of the company was expected to don a mask and perform various activities, including walking up five floors of the training tower with the gas mask on, sealed, and functioning. Although it is unclear whether Lt. Muscare, as a senior officer, was required to participate in the training, it is clear that appellant did not put the apparatus on and Johnson had no direct knowledge of whether or not Lt. Muscare could obtain a proper seal. Appellant testified that he successfully tested the mask portion of the apparatus during the training and had never experienced any difficulty obtaining a satisfactory mask seal in the past.

After class, instructor Johnson discussed Muscare's conduct with Chief Prohaska, the drillmaster, and stated that he did not know whether Muscare, while wearing his goatee, could get a good seal on a face mask. Later that month, appellant's superior officer, Chief Morgan, warned him that he would not be permitted to continue working as a firefighter unless he shaved off his beard. A few days thereafter, appellant was informed that charges had been filed against him with the administrative authorities. Nothing more appears to have taken place in regard to this matter for two and one-half months. Then, on the morning of February 27, 1974, three of Lt. Muscare's superiors appeared at his duty station and announced that he was being suspended as of that moment and that he was to turn in his equipment and badge.

On March 4, 1974, the Chief of Personnel sent appellant a letter, informing him that he was being suspended for 29 days for alleged violations of §51.133 (hair regulation), §61.001 ("conduct unbecoming a member or employee of the Chicago Fire Department"), and §61.006 (disobedience of orders). The instant action

followed, attacking not only the constitutionality of the hair regulation, but also the summary suspension procedures employed by the Department.

Appellant urges that due process requires that some opportunity to respond to charges against him be made available to the government employee prior to disciplinary action against him. *See Hostrop v. Board of Junior College District No. 515*, 471 F.2d 488 (7th Cir. 1972), cert. den., 411 U.S. 935 (1973). The Department responds that due process was satisfied since appellant had actual notice of the charges against him and had a statutory right to a post-suspension hearing before the Civil Service Commission, which he failed to exercise. We conclude that post-suspension review is insufficient.

Section 10-1-18 of the Illinois Municipal Code (Ill. Rev. Stat. 1973, ch.24) provides in pertinent part as follows:

> § 10-1-18. *Removal — Suspension — Retirement*
>
> Except as hereinafter provided in this section, no officer or employee in the classified civil service of any municipality who is appointed under the rules and after examination, may be removed or discharged, or suspended for a period of more than 30 days, except for cause upon written charges and after an opportunity to be heard in his own defense. * * * Nothing in this Division 1 limits the power of any officer to suspend a subordinate for a reasonable period, not exceeding 30 days except that any employee or officer suspended for more than 5 days or suspended within 6 months after a previous suspension shall be entitled, upon request, to a hearing before the civil service commission concerning the propriety of such suspension.

The Illinois Supreme Court recently had occasion to examine the constitutionality of summary suspension procedures used by the Chicago Police Department and concluded that the demands of due process were met by post-suspension review for suspensions of more than five days and less than 30 days. *Kropel v. Conlisk*, No. 45670 (Ill. S.Ct., decided January 30, 1975). That court, however, did not have the benefit of the United States

Supreme Court's recent decision in *Goss v. Lopez*, 95 S.Ct. 729 (1975). Though *Goss* is a "school" case, it nonetheless points the way to our resolution of the present case.

It can hardly be disputed that appellant, as a twenty-year veteran of the civil service, has a protected property interest in his employment, for "a state employee who under state law, or rules promulgated by state officials, has a legitimate claim of entitlement to continued employment absent sufficient cause for discharge may demand the procedural protections of due process." 95 S.Ct. at 735. Nor can it be disputed that appellant's suspension for 29 days is not *de minimis*, and the "Court's view has been that as long as a property deprivation is not *de minimis*, its gravity is irrelevant to the question whether account must be taken of the Due Process Clause." 95 S.Ct. at 737. It remains to answer the question what process is due, for in each situation the requirement is a flexible one.

As the Court has stated before and reaffirmed in *Goss*, "many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313 (1950). In the circumstances of America's high schools, the Court thought that notice, an explanation of the evidence the authorities have, and an opportunity to present his side of the story were sufficient to protect the student, and we think that at least this much is required in the circumstances of a public employee's suspension. Not only are alleged transgressions justifying suspension often more serious than school discipline problems, but the

corresponding penalties are potentially more damaging, for reputations, careers, and substantial amounts of lost pay are at stake.[3]

Public employees facing temporary suspension for less than 30 days have interests qualifying for protection under the Due Process Clause, and due process requires at the minimum that they be granted a hearing prior to suspension where they may be fully informed of the reasons for the proposed suspension and where they may challenge their sufficiency. Whether such persons should be granted the full panoply of rights envisioned in Ill. Rev. Stat., Ch. 24, § 10-1-18, for suspensions greater than 30 days is a question which we need not now address, since no hearing of any kind was accorded appellant prior to his suspension.[4]

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[3] Here, appellant lost some $1,400 in pay during the 29-day suspension. Such a financial blow can be disastrous to many civil servants. As Judge Skelton noted in *Ricucci v. United States*, 425 F.2d 1252 (Ct.Cl. 1970):

> Few [government employees] earn more than enough to pay their living expenses from month to month, and when their salaries are cut off, they may be in the same destitute circumstances as a welfare recipient whose aid has been discontinued. [425 F.2d at 1257 (concurring opn.).]

[4] The Supreme Court's disposition of *Arnett v. Kennedy*, 416 U.S. 134 (1974), only confirms our analysis of the precise question presented here. There, the Court rejected a due process attack on the discharge of a federal civil servant who had been provided, pursuant to the Lloyd-LaFollette Act, a month's advanced notice of the reasons for his proposed discharge, the materials on which the notice is based, and the opportunity to appear personally before the official having the authority to make or recommend the final decision. Although a three-judge plurality expressed the view that the statute which established the employment property right also established the procedural safeguards to which the employee was entitled, two other Justices concurred in the result solely because they believed that the statute's provision of notice and an opportunity to be heard prior to discharge satisfied the

(Footnote continued on following page)

We do not think that the requirement of presuspension review will result in any unnecessary burden on the administration of public services, nor will it shackle administrators and prevent them from dealing with emergency disciplinary problems, for, as the District of Columbia once pointed out:

> In a wide variety of situations, it has long been recognized that where harm to the public is threatened, and the private interest infringed is reasonably deemed to be of less importance, an official body can take summary action pending a later hearing. [R. A. Holman & Co. v. SEC, 299 F.2d 127, 131 (D. C. Cir.), cert. den., 370 U.S. 911 (1962).]

Here, we perceive no such justification for avoiding the requirement of a pre-suspension hearing. Even if we accept the Department's contention that the rationale behind its hair regulation is safety, a number of steps short of summary suspension are available to the Department pending a hearing on a violation of that regulation. Moreover, there is merit to appellant's comment in his brief that:

> The present case hardly presents an emergency requiring the Fire Department to act without any prior process, where the Fire Department utilized the services of Lt. Muscare for a period of over two months from the time in December of 1973 when he was initially reprimanded for wearing a goatee to the time he was suspended on February 27, 1974.

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[4] *Continued*
minimal requirements of constitutional due process. In dissent, four other Justice would have gone further and required additional safeguards such as an impartial hearing examiner, the opportunity to present witnesses, and the right to conduct cross-examination. It can hardly be said, therefore, that *Arnett* stands for the proposition that, by accepting governmental employment, a civil servant is entitled only to such procedures as are provided by statute.

Accordingly, we reverse the judgment of the district court and remand for further proceedings not inconsistent with this opinion.

REVERSED and REMANDED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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APPENDIX C

UNITED STATES COURT OF APPEALS
For The Seventh Circuit

May 21, 1975

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED AND REMANDED, with costs, in accordance with the opinion of this court filed this date.

• Associate Justice Tom C. Clark, United States Supreme Court (Retired), sitting by designation.

APPENDIX D

UNITED STATES COURT OF APPEALS
For The Seventh Circuit

June 17, 1975

ORDER

In the petition for rehearing and suggestions for rehearing *en banc* or, in the alternative, for certification of questions of law to the Supreme Court filed in the above-entitled cause, it is suggested that there is a conflict between our decision and *Brubaker* v. *Board of Education, School District 149, Cook County, Ill.*, 502 F.2d 973 (7th Cir. 1975). We note that in *Brubaker* on rehearing *en banc* this court affirmed the district court judgment by an equally divided vote, 502 F.2d 1000, but failed to reinstate the panel opinion. In addition, *Goss* v. *Lopez,* 419 U.S. 565 (1975), which we decided was controlling in *Muscare,* came down after *Brubaker.*

On consideration of the petition and suggestions, no judge in active service having requested a vote thereon, nor any judge having voted to grant the suggestions, and all of the members of the panel having voted to deny a rehearing,

IT IS ORDERED that the petition for rehearing in the above-entitled cause be and the same is hereby DENIED.